NO. COA02-211

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

TERESA A. CROSS,

Plaintiff,

v. Pitt County
No. 00-CVS-1402

DEBORAH N. HINES,

Defendant.

Appeal by plaintiff from judgment and order entered 23 October 2001 by Judge William C. Griffin, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 15 October 2002.

Ward and Smith, P.A., by Lynwood P. Evans and A. Charles Ellis, for plaintiff-appellant.

Gaylord, McNally, Strickland, Snyder & Holscher, L.L.P., by Danny D. McNally, for defendant-appellee.

MARTIN, Judge.

Teresa A. Cross ("plaintiff") brought this action alleging that she sustained injuries as a proximate result of negligence on the part of defendant Deborah N. Hines ("defendant"). Defendant filed an answer denying her own negligence and asserting plaintiff's contributory negligence as a defense.

Briefly summarized as relevant to our decision, the evidence at trial tended to show that on the afternoon of 28 November 1998, plaintiff was a passenger on a motorcycle being driven on a rural

road in Pitt County by her boyfriend, James Williams. Williams had purchased the motorcycle approximately two months earlier; it was a used motorcycle and had been damaged in a previous accident. Williams was in the process of repairing the front end of the motorcycle, which he described as "wrecked." The necessary repairs included repair to the front headlight of the motorcycle. Williams testified that on the day of the accident, the motorcycle had been fixed to the point it was rideable, but that he had not yet had the motorcycle inspected. Shortly before 12:30 p.m., Williams picked up plaintiff at her home, and the two set out to visit friends.

After riding the motorcycle about five miles, Williams and plaintiff encountered a vehicle being driven in the opposite direction of the two lane road by defendant. As Williams and plaintiff approached defendant, defendant stopped her vehicle and prepared to make a left-hand turn into her driveway. Defendant testified that upon stopping, she looked for oncoming vehicles, but did not see any. She then turned her head to the right to look at her dog, which was standing on the opposite side of the road from defendant's house, as she turned her vehicle to the left. Defendant testified she did not see the motorcycle approaching. Williams testified defendant pulled in front of the motorcycle while making the left turn, requiring that he bring the motorcycle to the ground in order to avoid a collision with defendant's vehicle. Plaintiff was thrown from the motorcycle and landed on the road at the entrance to defendant's driveway. Plaintiff

suffered various injuries, including head injuries, as a result.

Plaintiff testified that at the time of the collision, she was wearing a helmet which she had purchased new approximately one to two months prior thereto. Evidence was conflicting as to whether a sticker affixed to the helmet was an official Department of Transportation sticker, or one which read "I wear this helmet in protest." There was also conflicting evidence as to whether the motorcycle's headlight was illuminated at the time of the accident, but for purposes of this appeal, plaintiff stipulates the headlight was not illuminated.

The trial court denied plaintiff's motion for a directed verdict on the issue of contributory negligence at the close of all evidence and instructed the jury on the law of contributory negligence with respect to plaintiff's alleged failure to wear a proper safety helmet and her riding a motorcycle without the headlight illuminated. The jury returned a verdict in favor of defendant, finding defendant negligent and plaintiff contributorily negligent. Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, a new trial was denied and the trial court entered judgment on the verdict. Plaintiff appeals.

By six of the seven assignments of error contained in the record on appeal, plaintiff argues the trial court erred in instructing the jury on contributory negligence, and in denying her motions for directed verdict, judgment notwithstanding the verdict, and new trial because the evidence of contributory negligence was

insufficient, as a matter of law, to be submitted to the jury. For the reasons which follow, we agree that there was insufficient evidence to allow the jury to consider whether plaintiff was contributorily negligent based on her failure to wear a proper helmet. Consequently, because the jury may have based its finding of contributory negligence, in whole or in part, upon such failure, plaintiff is entitled to a new trial.

"'[I]n order for a contributory negligence issue to be presented to the jury, the defendant must show that plaintiff's injuries were proximately caused by his own negligence.'" *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998). "In order to avoid a directed verdict for plaintiff on contributory negligence, defendants must have presented more than a scintilla of evidence that plaintiff was negligent." *Maye v. Gottlieb*, 125 N.C. App. 728, 730, 482 S.E.2d 750, 751 (1997). "Evidence creating a mere possibility or conjecture is not sufficient to warrant submission to the jury." *Id.*

In the present case, defendant asserted that plaintiff was contributorily negligent in failing to wear a helmet in compliance with G.S. § 20-140.4, making it illegal for any person to "operate a motorcycle or moped upon a highway or public vehicular area . . . [u]nless the operator and all passengers thereon wear safety helmets of a type approved by the Commissioner of Motor Vehicles." N.C. Gen. Stat. § 20-140.4(a)(2) (2002). However, the only evidence that plaintiff's helmet was not an approved helmet was that it bore a sticker proclaiming "I wear this helmet in protest."

However, there was no evidence as to the intent or implication of the sticker, and its presence on the helmet amounts only to mere possibility or conjecture that the helmet was not of a type approved by the Commissioner of Motor Vehicles. While the sticker could have been placed on the helmet in protest of the law requiring helmet use, such action does not logically lead to the conclusion that the helmet was not an approved helmet. There is simply no evidence tending to show the helmet was not in compliance with G.S. § 20-140.4(a)(2).

Even if defendant had presented sufficient evidence that the helmet did not comply with the statute, the burden remained upon defendant to forecast more than a scintilla of evidence that plaintiff's failure to wear an approved helmet was a proximate cause of her injuries. Again, there is simply a complete lack of evidence on this necessary element. Defendant did not present any evidence -- medical or otherwise -- tending to show that an approved helmet would have prevented a single injury sustained by plaintiff. Therefore, the issue of contributory negligence based on plaintiff's failure to wear a proper helmet should not have been submitted to the jury. We explicitly do not address, however, plaintiff's argument that G.S. § 20-140.4(a)(2) is unconstitutionally vague, because that specific constitutional argument was not made to the trial court. *See, e.g., Augur v. Augur*, 149 N.C. App. 851, 854, 561 S.E.2d 568, 570 (2002) ("We re-affirm this Court's general rule that we will not decide constitutional issues in the first instance when the trial court

has not ruled upon them.").

Plaintiff also argues the issue of her contributory negligence based on the fact she was riding a motorcycle that did not have its headlight illuminated, in violation of G.S. § 20-129(c) should not have been submitted to the jury. Plaintiff argues there was no evidence to show that she had any way of knowing the headlight was not illuminated, and even if she had known it was not illuminated, the failure to illuminate the headlight did not proximately cause the accident.

Our Supreme Court has observed that in order to be contributorily negligent, a plaintiff need not have been aware of the danger of injury to which her conduct exposed her; contributory negligence is sufficiently established where the plaintiff's conduct ignores unreasonable risks which would not have been ignored by a prudent person exercising ordinary care. *Cobo*, 347 N.C. at 545-46, 495 S.E.2d at 365. We believe the evidence in this case was sufficient to allow the jury to consider whether a reasonable person in plaintiff's position would have taken steps to ascertain the status of the headlight before riding the motorcycle. The evidence revealed plaintiff had ridden motorcycles with Williams several times, including on extended road trips; that plaintiff had purchased clothing to wear while riding with Williams; that Williams and plaintiff often discussed motorcycles, including the riding of motorcycles and that Williams owned motorcycles; that plaintiff was familiar with Williams' riding habits; that Williams had purchased the motorcycle in a wrecked

condition and had been repairing it over the course of the two months prior to the accident, which repairs included fixing the headlight; and that at the time of the accident, Williams had just fixed the motorcycle to the point it was rideable, but the motorcycle had not been inspected. Moreover, according to defendant's testimony, the accident occurred because she was unable to see the motorcycle approaching, from which an inference can be drawn that the failure to illuminate the light contributed to her inability to see the motorcycle. We hold that it was a proper issue for the jury as to whether, based on the evidence, defendant would have seen the motorcycle approaching had its headlight been illuminated. *See Cobo*, 347 N.C. at 545, 495 S.E.2d at 365 ("The trial court must consider any evidence tending to establish plaintiff's contributory negligence in the light most favorable to the defendant, and if diverse inferences can be drawn from it, the issue must be submitted to the jury."). Nevertheless, as it is impossible to ascertain from the verdict sheet the basis for the jury's finding of contributory negligence, and the extent to which the jury considered plaintiff's failure to wear a proper helmet in so finding, plaintiff is entitled to a new trial.

In light of our decision, we need not address plaintiff's remaining assignment of error.

New trial.

Judges GREENE and BRYANT concur.

Report per Rule 30(e).